tion that an unofficial and partial examination revealed several errors which were indicative that clerical errors and omissions had been made which, if corrected, could change the result of the election. In response the Elections Subcommittee sent a group comprised of three members and counsel to Minnesota on February 27, 1958, for the purpose of conducting a spot check of ballots in various precincts in the counties of the district.

This action was taken in the absence of a formal election contest. . . . It was taken on the basis of a telegram from the defeated candidate citing the closeness of the vote and alleging clerical errors. . . .

. . . The minority members of the committee are unanimous in their opinion that if a spot check of ballots was justified in the 1958 Foley v. Quie case, with a margin of 602 ballots out of 87,950, based upon the telegraphic request of the defeated Democratic candidate, then a spot check of ballots in the current case where the difference is less, 348 ballots out of 154,272, is more than justified.

These members in their additional views also pointed to the "confusion which may be created during the period surrounding a general election by the existence of two separate committees of the House having parallel and overlapping jurisdiction."

The report of the Subcommittee on Elections was printed for use by the full Committee on House Administration. The report was adopted by the full committee on Nov. 20, 1963, but was not submitted to the House. Neither was any resolution dismissing the contest or declaring contestee entitled to his seat reported to the House from the Committee on House Administration.

Note: Syllabi for Odegard v Olson may be found herein at § 5.2 (overlapping jurisdiction of committees); § 25.5 (failure to produce evidence); § 43.14 (failure of committee to submit report).

§ 61. Eighty-ninth Congress, 1965–66

§ 61.1 Frankenberry v Ottinger

On the organization of the House of Representatives of the 89th Congress on Jan. 4, 1965, Mr. James C. Cleveland, of New Hampshire, objected to the oath being administered to the Member-elect, Richard L. Ottinger, from the 25th Congressional District of New York, who was then asked by the Chair not to rise while other Members-elect and the Resident Commissioner-elect were sworn. Carl Albert, of Oklahoma, the Majority Leader, thereupon offered the following resolution (H. Res. 2): [20]

Resolved, That the Speaker is hereby authorized and directed to administer

20. 111 CONG. REC. 20, 89th Cong. 1st Sess.

the oath of office to the gentleman from New York, Mr. Richard L. Ottinger.

The rules of the 89th Congress not having been adopted, Mr. Albert was recognized for debate on his resolution under general parliamentary rules. Mr. Albert yielded to Mr. Cleveland for a parliamentary inquiry as to whether it would be in order for Mr. Cleveland to offer a substitute resolution or an amendment, particularly should the previous question be ordered. The Speaker replied that Mr. Albert controlled all time and would have to yield for that purpose, which Mr. Albert refused to do. Mr. Albert then refused to yield for further parliamentary inquiries and moved the previous question, which was ordered by voice vote. The resolution was then agreed to by voice vote. Mr. Ottinger thereupon appeared at the bar of the House and took the oath of office.

On Jan. 4, 1965, Mr. Cleveland explained the reasons for his objection to Mr. Ottinger being administered the oath of office; in an extension of remarks in the *Congressional Record*,[1] Mr. Cleveland alleged that at least $187,000 had been spent in the Ottinger campaign, of which $167,000 had been contributed by the Member's family, in violation of 18 USC § 608, which limits to $5,000 the amount any one person may contribute either directly or indirectly to any candidate for federal office. Mr. Cleveland also stated that Mr. Ottinger established at least 34 committees, and that two members of his family made $3,000 contributions to each of 22 committees, in order to avoid gift tax payments and to avoid making the contributions directly to the candidate.

On Jan. 18, 1965, Mr. Albert informed the House that on the following day he would call up a privileged resolution to dismiss the Frankenberry v Ottinger contest, which had been initiated by notice of contest delivered by contestant on Dec. 19, 1964, as required by 2 USC § 201. Mr. Albert obtained unanimous consent to insert in the *Congressional Record* a letter from H. Newlin Megill, assistant clerk of the House, addressed to the Speaker and advising him that persons permitted to bring contests under 2 USC §§ 201–226 "should be a party to the election and have the expectation that as a 'contestant' he would be able to establish 'his right to the seat'." The full text of the letter was as follows:

January 14, 1965.

The Honorable the SPEAKER,
House of Representatives.

DEAR MR. SPEAKER: Following the suggestion made by you in our tele-

1. *Id.* at pp. 41–45.

phone conversation, just prior to the convening of this session of the Congress, I received the Honorable Richard L. Ottinger, and discussed with him the matter of the attempt by James R. Frankenberry to challenge his right to a seat in the 89th Congress, under the provisions of Revised Statutes 105–130, as amended (2 U.S.C. 201–226).

An examination of the questions raised by Representative Ottinger and his counsel led me to the following conclusions which were conveyed to him orally, together with the copy of a draft of a resolution, which you may possibly hold to be privileged, for action by the House:

1. James R. Frankenberry is not a competent person to bring such action under this statute.

2. The said James R. Frankenberry was not a party to the election held November 3, 1964, in the 25th Congressional District of the State of New York, at which the Honorable Richard L. Ottinger was elected. It would appear that Frankenberry is merely the campaign manager of former Representative Robert R. Barry, who was, in fact, the defeated candidate in this district. (See records of the secretary of state, State of New York, and the Clerk of the U.S. House of Representatives.)

3. A reading of the fact of the statute which has been provided by the House of Representatives as "a good and sufficient rule to be followed and not to be departed from except for cause" merely leads to the conclusion that a person availing himself of the provisions of this act should be a party to the election and have the expectation that as a "contestant" he would be able to establish "his right to the seat." Among the clear expressions in this act, as amended, there appears this language, "No contestee and contestant for a seat in the House of Representatives. . . ." (2 U.S.C. 226.)

4. An examination of the various digests of all contest election cases in the House of Representatives fails to show that a single person has been permitted to use the statute in the manner proposed by Mr. Frankenberry in the matter at point.

5. The House of Representatives has decided that such an attempted action is not proper and that such a person is not competent to avail himself of the provisions of this act. (See H. Res. 54, agreed to January 10, 1941, *In re Locke Miller* v. *Michael J. Kirwan*, 19th Congressional District of Ohio.)

The House of Representatives may adjudicate the questions of the right to a seat in either of the following cases:

First. In the case of a contest between the "contestant" and the "returned member" of the House instituted in accordance with the provisions of the act of 1851, as amended.

Second. In the case of a "protest" or "memorial" filed by an elector of the district concerned.

Third. In the case of the "protest" or "memorial" filed by any other person.

Fourth. On motion of a Member of the House.

Every avenue of approach, cited above, is available to Mr. Frankenberry in his attempt to question the right of the Member to a seat, but the first case.

For the reasons heretofore cited, supported by other actions of the House in

such matters, I have supplied a draft of the following language for the possible consideration, and such action as the House in its wisdom may take:

"Whereas James R. Frankenberry, a resident of the city of Bronxville, N.Y., in the Twenty-fifth Congressional District thereof, has served notice of contest upon Richard L. Ottinger, the returned Member of the House from said district, of his purpose to contest the election of said Richard L. Ottinger; and

"Whereas it does not appear that said James R. Frankenberry was a candidate for election to the House of Representatives from the Twenty-fifth Congressional District of the State of New York, at the election held November 3, 1964; nor was he a candidate for the nomination from said district at the primary election held in said district, at which Richard L. Ottinger was chosen the Democratic nominee: Therefore be it

"*Resolved*, That the House of Representatives does not regard the said James R. Frankenberry as a person competent to bring a contest for a seat in the House and his notice of contest, served upon the sitting Member, Richard L. Ottinger, is hereby dismissed; and no petition or other paper relating to the subject matter contained in this resolution shall be received by the House, or entertained in any way whatever."

It would appear that the House should desire to take this action since:

(a) Mr. Frankenberry is attempting to misuse the statute provided by the House of Representatives.

(b) The House of Representatives has the responsibility of relieving the sitting Member from the burden of defending himself in this improper action, under the cumbersome statute, for a period of more than 10 months, so that he may participate fully in his constitutional duties of representing his congressional district.

(c) The courts held that questions as to the application of the statute are justifiable by the House and by the House alone. (See *In re Voorhis* (S.D. N.Y. 1923), 291 F. 673).

(d) Mr. Frankenberry has at least three other ways, which are proper, to proceed in this matter.

Such an action by the House of Representatives would put the question in proper perspective and preserve the rights of all parties.

Your interest prompted me to make this written report to you.

I am, Mr. Speaker,

Respectfully yours,

H. NEWLIN MEGILL.

On Jan. 19, 1965, Mr. Albert called up the following privileged resolution: (2)

Whereas James R. Frankenberry, a resident of the city of Bronxville, New York, in the Twenty-Fifth Congressional District thereof, has served notice of contest upon Richard L. Ottinger, the returned Member of the House from said district, of his purpose to contest the election of said Richard L. Ottinger; and

Whereas it does not appear that said James R. Frankenberry was a candidate for election to the House of Representatives from the Twenty-Fifth

2. 111 CONG. REC. 810, 811, 951, 89th Cong. 1st Sess. [H. Res. 126].

Congressional District of the State of New York, at the election held November 3, 1964; Therefore be it

Resolved, That the House of Representatives does not regard the said James R. Frankenberry as a person competent to bring a contest for a seat in the House and his notice of contest, served upon the sitting Member Richard L. Ottinger, is hereby dismissed.

Mr. Albert was recognized for one hour under the rules of the House, and he proceeded to cite the case of *In re Voorhis* (S.D.N.Y. 1923), 291 F 673, which held that the application of the statutes in question is justifiable by the House and by the House alone. Mr. Albert then cited the contest of Miller v Kirwan (77th Cong. 1st Sess.), in which the House had agreed to a resolution dismissing the contest, as contestant there had not been a proper party within the applicable statute because he could not, if he were successful, establish his right to a seat in the House. Contestant in that case had been candidate for the disputed office in the primary, but was not a candidate in the general election. In that case the resolution dismissing the contest had been called up on the floor for direct action by the House, without having been referred to or reported from the Committee on House Elections. Mr. Albert then stated that "there is no case on record that we have been able to find to the contrary, that a person not a party to an election contest is eligible to challenge an election under these statutes."

Mr. Charles E. Goodell, of New York, claimed that House Resolution 126 had been called up on that day (Jan. 16, 1965) in order to obviate the proceedings which had been instituted by contestant under 2 USC § 206 in the New York State Supreme Court for the taking of depositions and testimony on that date, which the contestee had not attended, in disregard of a court subpena. Claiming that there were many precedents of the House which denied a Member a seat due to excessive contributions and expenditures, Mr. Goodell asked that the matter be referred to the Committee on House Administration under the contested election statutes for full investigation.

Mr. Cleveland then cited the language of 2 USC § 201, as follows:

Whenever any person intends to contest an election of any Member of the House of Representatives of the United States he shall—("It does not say a candidate only.")

Mr. Cleveland then cited the final report of the Special Committee to Investigate Campaign Expenditures of the 88th Congress (H. Rept. No. 1946) as "the policy

established by the House Committee on Administration":

> In order to avoid the useless expenditures of funds and the loss of time by the committee and the staff, it has been decided by the committee to conduct investigations of particular campaigns only upon receipt of a complaint in writing and under oath by *any person*, candidate, or political committee, containing sufficient and definite allegations of fact to establish a prima facie case requiring investigation by the committee. (Emphasis added.)

This statement represented the policy of the special committee, and not the construction of the statute by the Committee on House Administration. The special committee report was transmitted by its chairman to the Clerk of the House for the 89th Congress, with the request that it be referred by the House to the Committee on House Administration. The Clerk did not transmit this report to the House for referral.

Mr. Goodell proceeded to cite the 89th Congress investigation of the question of the final right of Dale Alford to his seat as "a precedent in which noncandidates have contested House seats, in which full investigations have been had by the House Committee on Administration." Mr. Eugene J. Keogh, of New York, questioned Mr. Goodell as to whether "that was an investigation that was under a special resolution of the House Committee on Administration and not under the general law regarding the matter of elections." Mr. Cleveland refused to yield for an answer, but proceeded to insert in the Record two briefs prepared by the American Law Division of the Library of Congress on the question of "whether a noncandidate must proceed under 2 USC § 201," in support of his opposition to the adoption of House Resolution 126.[3]

Mr. Cleveland then stated:

> [U]nder the contested election law the contestant bears the expense of the whole matter of taking depositions and gathering testimony. This is the reasoning behind it. That reasoning clearly specifies the fact that this law not only can be used by a noncontestant but it indeed must be used.

Mr. Albert replied that, if the House were to follow the recommendations of the gentleman from New Hampshire (Mr. Cleveland)—

> [W]e would be opening up to anybody or to any number of individuals, for valid or for spurious reasons, the right to proceed under these statutes, to contest the election of any Member of the House. These statutes place burdensome obligations on any contestee and should not be construed to open up the opportunity for just anyone to harass a Member of Congress or to impede the operations of the House.

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3. *Id.* at pp. 953, 954.

Other remedies are available to the public generally and to Members of the House. Any individual or any group of individuals has a right to introduce a resolution at any time, calling for the investigation of any election. In the ordinary course of events, such a resolution would be referred to the Committee on House Administration, and thereafter to the Subcommittee on Elections, for investigation or hearings, as that committee or as the House might deem necessary under the circumstances.

If the contention of the gentleman is correct, there is no limit to the number of individuals who could contest any seat in this House, if the contest were brought in due time.

Mr. Albert then proceeded to cite other sections of 2 USC §§ 201–226, the statutes governing contested election cases, in order to show that Congress intended to limit the language "any person" in section 201 to a contestant for a seat in the House. He cited section 226 as follows:

No contestee or contestant for a seat in the House of Representatives shall be paid exceeding $2,000 for expenses in election contests.

Mr. Cleveland replied, in further opposition to the adoption of House Resolution 126, that:

[T]he intent of that is clearly that any reimbursement will be confined either to a seated or to a defeated Member. It simply limits the amount of reimbursement of expenses to these two classes. It does not govern the first section that specifically says any person can contest an election. . . .

The purpose of this law is to safeguard the people of the United States against a situation where the defeated candidate might not either have the heart or the will or the desire to contest an election which clearly should be contested for the common good and for the cause of good government.

Omar T. Burleson, Chairman of the Committee on House Administration and a Member from Texas, reminded the House that "he who seeks equity must do so with clean hands. This is a unilateral action. How could this House in its collective judgment determine whether or not equity is being done when the other party to the election is not a party to this attempt at contest?"

Mr. Albert moved the previous question, which was ordered by voice vote. Mr. Goodell demanded the yeas and nays on the resolution and the yeas and nays were ordered. By a vote of 245 yeas to 102 nays with 3 "present," the House agreed to House Resolution 126, thereby holding contestant not competent to bring a contest under 2 USC § 201, and dismissing the notice of contest served upon the sitting Member.

Note: Syllabi for Frankenberry v Ottinger may be found herein at § 19.2 (contestants as candidates in general election).

§ 61.2 Wheadon et al. v Abernethy et al.

On Sept. 17, 1965, Mr. Omar T. Burleson, of Texas, by direction of the Committee on House Administration, called up House Resolution 585,[4] dismissing the five Mississippi election contests arising from the November 1964, congressional elections. The cases were the election contests of Augusta Wheadon against Thomas G. Abernethy in the First Congressional District; Fannie Lou Hamer against Jamie L. Whitten in the Second; Mildred Cosey, Evelyn Nelson, and Allen Johnson against John Bell Williams in the Third; Annie DeVine against Prentiss Walker in the Fourth; and Victoria Jackson Gray against William M. Colmer in the Fifth Congressional District in the State of Mississippi.

The questions presented in these contests were considered simultaneously. The questions involved the failure of the contestants to avail themselves of the legal steps to challenge alleged discrimination among voters prior to the elections and to challenge the issuance of the certificates of election to the contestees after the elections were held. The denial of seats to Members-elect because of the alleged discriminatory practices involving disenfranchising groups of voters, and the standing of the contestants to proceed under the contested elections statute, were also at issue.

The contestees had been elected at the November 1964, general election. The contestants had been selected at an unofficial "election" held by persons in Mississippi from Oct. 30 through Nov. 2, 1964, in which, it was alleged, "all citizens qualified were permitted to vote." The latter "election" was held without any authority of law in the state. The contestants were all citizens, none of whom had been candidates in the November elections. They alleged that disenfranchisement of Negroes in Mississippi violated the Constitution and laws of the United States and that the House had the authority to consider the contests and unseat the contestees; that the House had a duty to guarantee that the election of its Members be in accordance with the requirements of the Constitution, and that where large numbers of Negroes had been excluded from the electoral process, where intimidation and violence had been utilized to further such exclusion, and where the free will of the voters had been prevented from being expressed, the House should

4. 111 CONG. REC. 24263, 89th Cong. 1st Sess.

unseat the contestee, vacate the elections and order new elections.

Hearings were held by the Subcommittee on Elections of the Committee on House Administration, on Sept. 13 and 14, 1965. The committee issued a report, House Report No. 1008, 89th Congress, first session, on Sept. 15, 1965.

The report noted that the contestees had been sworn in by vote of the House 276 to 149 on Jan. 4, 1965,[5] after they had been asked to step aside.[6] This established the prima facie right of each contestee to his seat.

The report noted that the contestants had not availed themselves of legal steps to challenge, in the courts, the alleged exclusion of Negroes from the ballot or the issuance of the certificates of election to the contestees.

It noted that the contestants had not been candidates at the election and thus, under House precedents, had no standing to invoke the House contested election statute.

It noted that there had been an election in Mississippi, in November 1964, for Members of the U.S. House of Representatives under statutes which had not been set aside by a court of competent jurisdiction; that, at the same election, Presidential electors and a U.S. Senator had been elected without question.

It noted, however, that a case challenging the Mississippi registration and voter laws was progressing through the United States courts and that the question of the constitutionality of the statutes was a proper one for the courts. The report noted also that the House was the judge of the elections of its Members and it was doubtful that any disenfranchisement, even if proven, would have actually affected the outcome of the November 1964, Mississippi congressional elections in any district.

The House, in following its rules and procedures should dismiss the cases, the report concluded, because the contestants did not qualify to utilize the House contested elections statute, and because the contestees had been elected under laws that had not been set aside at the time of the election.

The report did state, however, that in arriving at such conclusions, the committee did not condone disenfranchisement of voters in the 1964 or previous elections, nor was a precedent being established to the effect that the House

5. 111 CONG. REC. 19, 89th Cong. 1st Sess. [H. Res. 1].

6. *Id.* at p. 18.

would not take action, in the future, to vacate seats of sitting Members. It noted that the Federal Voting Rights Act of 1965 had been enacted in the interim and that if evidence of its violation were presented to the House in the future, appropriate action would be taken.

The report recommended dismissing the cases.

A minority view recommended consideration of the cases on their merits rather than on the grounds of status of the contestants, because, under the laws in the state in 1964, the claimants could not have become candidates to avail themselves of the contested elections act.

After extensive debate,[7] the House, by a vote of 228 to 143, agreed to House Resolution 585, which provided:[8]

> *Resolved,* That the election contests of Augusta Wheadon, contestant, against Thomas G. Abernethy, contestee, First Congressional District of the State of Mississippi; Fannie Lou Hamer, contestant, against Jamie L. Whitten, contestee, Second Congressional District of the State of Mississippi; Mildred Cosey, Evelyn Nelson, and Allen Johnson, contestants, against John Bell Williams, contestee, Third Congressional District of the State of Mississippi; Annie DeVine, contestant, against Prentiss Walker, contestee, Fourth Congressional District of the State of Mississippi; and Victoria Jackson Gray, contestant, against William M. Colmer, contestee, Fifth Congressional District of the State of Mississippi, be dismissed and that the said Thomas G. Abernethy, Jamie L. Whitten, John Bell Williams, Prentiss Walker, and William M. Colmer are entitled to their seats as Representatives of said districts and State.

An amendment was adopted striking out the phraseology entitling the contestees to their seats, as language inappropriate in a procedural matter.[9]

Note: Syllabi for Wheadon v Abernethy may be found herein at § 11.3 (racial discrimination as grounds for bringing contest); § 14.2 (invalid elections); § 19.3 (contestants as candidates in general election); § 35.1 (administration of oath as prima facie evidence of right to seat); § 44.1 (form of resolution disposing of contest).

§ 61.3 Peterson v Gross

On Oct. 11, 1965, Mr. Omar T. Burleson, of Texas, at the direction of the Committee on House Administration, called up a resolution (H. Res. 602)[10] dismissing

7. 111 CONG. REC. 24263–92, 89th Cong. 1st Sess.

8. *Id.* at p. 24263.

9. *Id.* at p. 24292.

10. 111 CONG. REC. 26499, 89th Cong. 1st Sess.

the election contest of Stephen M. Peterson against Harold R. Gross in the Third Congressional District in the State of Iowa. The committee report, House Report No. 1127, had been issued on Oct. 8, 1965, after hearings had been conducted on the case on Sept. 28, 1965.

The contestee was certified to have received 83,455 votes, and the contestant 83,036 votes at the Nov. 3, 1964, election. Contestee took the oath on Jan. 4, 1965, without objection and was sworn.[11] The contestant filed a notice of contest on Dec. 31, 1964, and requested a recount. The contestant alleged violations of the laws of Iowa, including burning of some ballots the day after the election, the casting of more ballots than there were names listed on the polls, the recording of absentee ballots in a back room by one person, and disappearance of a tally sheet.

The committee found that the proof presented did not sustain the charges brought and recommended dismissal of the contest.

The committee found that although there may have been human errors committed at the polls on election day, there was no evidence of fraud or willful misconduct. It found that the burned ballots were unused ballots and the practice of burning such ballots had been a uniform one for numerous years. The allegation of more ballots cast than names listed on the polls was discharged by the conclusion that some inadvertent errors had been made but the errors were insufficient to change the result even if all the excess ballots were added to the total of the contestant. The charge respecting the counting of absentee ballots was found to apply to one polling place and the circumstances were such as to make it inadequate as a charge.

The missing tally sheet was located and the disappearance found to be due to factors involving technical operation of a voting machine, not the counting of the results.

It was further disclosed that the request for a recount was in the nature of a "fishing expedition" and that the contestant knew of no fraud by which to substantiate it.

The committee acknowledged that Iowa had no recount statute applicable to a U.S. House election but held that the absence of such a statute had no effect on the jurisdiction of the committee; that the committee would proceed to a recount if some substantial allega-

11. *Id.* at p. 19.

tions of irregularity or fraud were alleged and if the likelihood existed that the result of the election would be different were it not for such irregularity or fraud.

Under the circumstances of the case, it declared, the evidence did not justify a recount since the contestant had not clearly presented proof sufficient to overcome the presumption that the returns of the returning officers were correct.

In the debate on Oct. 11, 1965, on House Resolution 602, Robert T. Ashmore, of South Carolina, Chairman of the Subcommittee on Elections of the Committee on House Administration, spoke in favor of adopting the resolution dismissing the contest. Mr. Ashmore observed that the contestee had been issued a certificate of election by the Governor of Iowa, administered the oath of office by the Speaker, and performed his duties as required under his oath of office, "So, as a result of these events, he has established a prima facie right to the office." Mr. Ashmore recounted some of the alleged errors recited by the contestant that the committee had found to be unsubstantiated, and stated:

> Moreover, Mr. Speaker, the evidence in this case shows that such errors were wholly insufficient to change the results of the election, even if the excess ballots about which we speak here in this particular instance should all be added to the total of the contestant. . . . In this case the committee is of the opinion that no alleged misconduct or error on the part of the election judges, nor a combination of all such errors by any and all officials in the entire Third Congressional District of the State of Iowa, would be sufficient to change the results of this election.[12]

Mr. Ashmore then cited the election case of Eggleston v Strader (2 Hinds' Precedents § 878) on the point.

Mr. Ashmore also pointed out that the evidence showed that no one protested any of the election proceedings during election day and there was "nobody who testified on election day that the results were anything but proper." Reminding the House that there is a presumption of regularity—that the election officials have done their duty and their returns are correct—Mr. Ashmore then stated:

> The burden of proof, my friends, let us not forget, rests upon the contestant. It is squarely on his shoulders to show sufficient grounds to justify a recount or to unseat a Member of this House. He must meet his obligation. It is not the committee's duty to prove his case for him. The contestant must prove not just irregularities—and not just violations of the Iowa election

12. *Id.* at p. 26499.

laws, but also that if such irregularities had not existed the results of the election would have been different.(13)

Mr. Willard S. Curtin, of Pennsylvania, also spoke in favor of the resolution, remarking that the contestant had sent a letter to many Members, in which letter the contestant admitted that he was not alleging fraud on the part of anyone. Mr. Curtin repeated that the committee investigation had revealed no substance to the contestant's allegations of error.

In opposition to the resolution, Mr. Frank Thompson, Jr., of New Jersey, argued that fraud was not necessarily a condition precedent for an election contest. The following colloquy took place: (14)

MR. THOMPSON of New Jersey: I do not mean to bicker with the distinguished chairman of the subcommittee. I just wanted to emphasize that in his remarks, as in the remarks of our colleague from Pennsylvania, there was some emphasis on the absence of fraud.

We acknowledged the absence of fraud, but in no circumstances should we establish as a condition precedent to a contest that there be fraud.

MR. ASHMORE: I mentioned that there was no fraud because of its absence, which I believe is worth noting—the fact that there was no fraud.

MR. THOMPSON of New Jersey: We will concede there was no fraud. Will the gentleman concede that it is not a condition precedent to an election contest for a House seat?

MR. ASHMORE: Absolutely it is not.

MR. THOMPSON of New Jersey: I thank the gentleman.

Thereafter, Mr. Thompson, Mr. Ashmore, and other Members lamented the absence of state procedures in Iowa for contesting elections and conducting recounts. After more discussion by Mr. Samuel L. Devine, of Ohio, in favor of the resolution, Mr. Neal Smith, of Iowa, made reference to the inequities involved in contested elections, and commented on the election case, the costs of proceeding under the committee rules and the composition of the committee: (15)

MR. SMITH of Iowa: Mr. Speaker, I have not been a direct participant in any way in this contest. I considered it to be a contest between Mr. Peterson and Mr. Gross. I am not a member of the committee. But, after all, I am from Iowa and so I have been interested in following the procedures very carefully in this case.

I would vote in any election contest to seat whoever I believe actually received the most votes. Unfortunately, we cannot vote on that basis on this resolution today because I do not and other members do not know who received the most votes in the Third Congressional District of Iowa in 1964. . . .

13. *Id.* at p. 26500.

14. *Id.* at p. 26501.

15. *Id.* at pp. 26502, 26503.

Because evidence was being hidden and the attitude of election officials in some counties indicated they would destroy more evidence, the contestant went to both the State and Federal courts. In each case the contestee claimed the courts did not have jurisdiction and the courts said the jurisdiction is in the House of Representatives except that the State supreme court did order the voting records held until the 89th Congress had a chance to convene and organize. I do not criticize those court opinions but they do completely undercut the claim of some that the committee should not assume full jurisdiction. . . .

When the 89th Congress convened and organized, and the contest had been filed, the chairman of the subcommittee [Mr. Ashmore] properly sent a telegram asking election officials to hold election material. Some of them used this telegram as an excuse not to permit inspection of it subsequently at a time when they could be put under oath and examined concerning it.

When election officials resist producing pertinent documents upon which they should be examined, it would take more time to go through court procedures for each official involved than is allowed under committee rules to complete discovery and anyway court opinions have indicated lack of jurisdiction for supervision. Under these procedures, it costs a contestant from $10,000 to $30,000 to run through the obstacle course. Few, if any Democratic candidates for Congress in Iowa have ever had $10,000 available to spend in a general election campaign, let alone a contest, and to force a contestant to raise that amount of money for a contest while the contestee is drawing his salary and furnished a staff and office is in and of itself a very unfair practice. . . .

In one county, absentee ballots were burned. The county election official naturally said they were unused ones and that he had done that before. The fact that someone has broken the law before does not make him immune thereafter. The only way anyone could know whether they substituted ballots and burned the ballots that were replaced would be for the committee to have a handwriting expert look at those ballots that were left.

With the adoption of this report, without pertinent records having been inspected, the officials who committed irregularities will be free to finish destroying evidence without anyone but those election officials knowing whether irregularities were committed for the purpose of stealing votes.

Following more discussion focusing on the contestant's failure to prove his case, Mr. Omar T. Burleson, of Texas, stated that members on the committee were chosen because they were lawyers and because of their experience and that objectivity was characteristic of the committee:

MR. BURLESON: Mr. Speaker, I am sure that the gentleman from Iowa did not intend to infer that by design the people of, we will say for the lack of a better word, conservative persuasion or from the South, have intentionally been assigned to the Subcommittee on Elections. As a matter of fact, the members of this subcommittee have been chosen because they are lawyers.

Or like myself—they were lawyers. I usually speak of myself in that respect in the past tense. But they were put on that committee for that reason. Also they were recognized according to seniority, a consideration which is always given in these things.

There has never been any attempt to stack the committee and I am sure the gentleman would not intentionally make that as an accusation, but I think he did infer it.

MR. SMITH of Iowa: I did not intend to reflect upon any one section of the country. I just want to say, if any one section of this country has every member on an election subcommittee, it gives a general image that is not good, no matter what section of the country they are from.

MR. BURLESON: It may appear that way but the subcommittee and the full committee in handling these matters, during the 19 years that I have served in this capacity, have always tried to be as judicial and as analytical and objective in these matters as it is possible to be and as our capacities permit us to be. I have never seen a partisanship angle which I thought overcame or prejudiced an objective decision in these matters.

The House, by voice vote, agreed to House Resolution 602 and a motion to reconsider was laid on the table.(6)

Note: Syllabi for Peterson v Gross may be found herein at § 5.4 (qualifications of Members on Subcommittee on Elections); § 13.3 (alleged error insufficient to change result); § 36.6 (official returns as presumptively correct); § 40.6 (burden of proving recount would change election result).

16. *Id.* at p. 26504.

§ 62. Ninetieth Congress, 1967–68

§ 62.1 Lowe v. Thompson

The report (No. 365, submitted June 14,1967) of the committee on elections in the case of Lowe v Thompson showed that Fletcher Thompson, the Republican nominee, was elected to the office of Representative from the Fifth Congressional District of Georgia in the general election held on November 8, 1966. The only names on the ballot were those of Mr. Thompson and his Democratic opponent, Archie Lindsey. His credentials having been presented to the Clerk of the House, Mr. Thompson appeared, took the oath of office, and was seated on January 10, 1967.

The contest of Mr. Thompson's election was initiated by Mr. Wyman C. Lowe by service upon the then Member-elect on December 12, 1966, of a notice of contest pursuant to the Federal contested election law, Revised Statutes, title II, chapter 8, section 105; title 2, United States Code, section 201, claiming that contestee's